United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7215

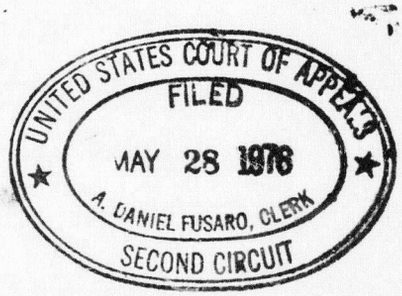
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

JENNIFER MARAGET, a minor By Next Friend and Mother, SANDRA MARAGET, Appellant	X	
VS.	X	Civil Appeal
BRIAN WRIGLEY, in his capacity as Principal of South Royalton High School; DONALD E. JONES, in his capacity as Superintendent of Schools, Windsor-Orange School District; BETTY LAWHITE, RICHARD ELLIS, HERBERT CRAWFORD, IRENE CAMP and BEATRICE DODGE, in their capacity as members of the Board of Education for South Royalton High School, Appellees	X	File No. 76-7215

B

P/S

On Appeal From The
United States District Court
For the District of Vermont



APPELLEES' BRIEF

Paterson, Gibson, Noble
& Brownell
26 State Street
P.O. Box 159
Montpelier, Vermont 05602
Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES
(continued)

STATUTES: Page

OTHER AUTHORITIES:

STATEMENT OF THE CASE

With certain exceptions, noted herein, the Appellees (referred to hereinafter as "the School") are prepared to accept the Statement of the Case which has been furnished by counsel for Appellant, Jennifer Maraget. In the interest of furnishing this Court with a more complete picture of the efforts which were made by the School in order to avoid mistake or unfairness in the expulsion of Jennifer Maraget, however, the School would amplify upon Appellant's Statement of the Case in the following respects.

On January 19, the date of the incident which precipitated the proceedings which ultimately led to the expulsion of Jennifer Maraget from South Royalton High School, and as noted in Appellant's Statement of the Case, she and the Principal of the School, Appellee Brian W. Wrigley, had three or four conversations relating to the incident, one of which took place in the presence of her parents (Tr.8,10). During the course of these conversations, Principal Wrigley explained to Jennifer that she was suspected of having given pills and rum to Paula Simonds, another student at the School, and that as a result, Paula Simonds had become ill and had been taken to a hospital (Tr. 9, 56-57). During the course of these conversations, he asked Jennifer whether she had been involved, and gave her an opportunity to present her side of the story (Tr. 51, 52). When asked by Jennifer

who had told him that she had been involved, he told her that Paula Simonds had told him that Jennifer had given her pills and rum; Jennifer, at this time, denied having done so (Tr. 9). The following day, Jennifer spoke over the telephone to Principal Wrigley, admitting that she had brought the pills and rum into School, and apologized for doing so (Tr. 26). At this time, Principal Wrigley accepted the apology, but advised Jennifer that he had determined to go ahead with suspension and a recommendation for expulsion (Tr. 37). The suspension so imposed lasted until January 29, 1976, and consisted of seven days of school. (Tr. 59) By a letter dated January 21, Principal Wrigley notified Jennifer's parents that a meeting of the School Board would be held on January 29, 1976, to consider her expulsion from school. (Tr. 38) This letter was incorporated into Plaintiff's Complaint below as Attachment No. 1, and was addressed to Jennifer's father. In the letter, Principal Wrigley referred to the discussion of the previous day with Mrs. Maraget and Jennifer, indicating that he had done further investigation, and that the results of it led him to believe that Jennifer was involved in providing pills and alcohol to other students. The letter went on to say:

> "For the stated reasons, I am suspending Jennie from school until January 29. On January 29, at our next School Board meeting, I am going to report this incident to the Board members and recommend immediate expulsion. You are invited to that meeting. It is your right to have a hearing before any decisions are made, just as we did yesterday when we discussed the problem in my office."

Jennifer's parents received this letter, and Jennifer, in fact, read the letter prior to the January 29 hearing. (Tr. 26)

On the day of the hearing, Jennifer's father delivered a letter to one of the Board members, indicating only that Jennifer's mother was too upset to attend the hearing, and requesting leniency from the Board. (Tr. 27, 68, 70-71; Attachment No. 2 to Plaintiff's Complaint) Testimony also indicated that Jennifer's father would have been fully able to attend this hearing, and that no doubt existed in Jennifer Maraget's mind as to what it was that she had been charged with doing by the Principal. (Tr. 27) [It is Appellees' position that no testimony or evidence was offered during the course of the hearing before Judge Holden that a postponement of the January 29 hearing was requested. The letter from Jennifer Maraget's father to the School Board, at best, constituted a request for a rehearing in event of expulsion and not a postponement. In any case, p. 69 of the Transcript of the hearing does not support the contention

that a postponement of the January 29 hearing was sought.] In the absence of either Jennifer or her parents, but having furnished this opportunity for them to be heard, the Board proceeded to consider the expulsion issue, and as noted in Appellant's Statement of the Case, voted to expel her.

After advising Jennifer's father by letter that Jennifer had been expelled for the remainder of the school year, with the following year's attendance subject to proper behavior and a favorable recommendation from a professional counselor (Attachment No. 4 to Plaintiff's Complaint), Jennifer's parents requested another hearing, which was granted. Jennifer appeared at this hearing with her parents, and was represented at it by counsel who had been retained seven days before the hearing (Plaintiff's Complaint, ¶15 and ¶16). Jennifer's counsel participated at the hearing, was not restricted in any way in asking questions, and was free to cross-examine the witnesses. (Tr. 71-72). Furthermore, at this hearing, Jennifer Maraget admitted that she had brought pills and alcoholic beverages into the School. (Tr. 72) No evidence was adduced at the hearing before Judge Holden that Jennifer's counsel made any advance request to the Board on Jennifer's behalf for specific notice of charges, names of prospective witnesses, or the substance of their testimony. From all that appears in the transcript below,

no such objections appear to have been raised by counsel for Jennifer Maraget at the School Board hearing itself.

After the February 13 hearing, the Board again voted to expel Jennifer Maraget from the School, indicating that the School would accept accredited correspondence courses toward her graduation requirements. (Tr. 75)

As Appellant's counsel points out, a conference was held in chambers at the end of the testimony in the hearing before Judge Holden. Recognizing that the recollection of attorneys, like those of all people, is imperfect, counsel for Appellees would note that their recollection of Judge Holden's comments in chambers differ from that of opposing counsel. Counsel for the School recalls that while Judge Holden indicated his belief that Jennifer's expulsion from school may have caused her irreparable harm up to the date of the hearing, a grant of the Temporary Restraining Order sought could not erase that harm, and that, indeed, regardless of whether he ordered the School to reinstate her, or whether Jennifer chose to attend one of the other schools open to her, any past harm, other than what he viewed as an incomplete accord with her procedural due process rights, was irreversible. Consequently, he told counsel that he proposed to order that an impartial hearing be conducted as to the factual issues which might justify expulsion of Jennifer Maraget, and counsel for Plaintiff and Defendants

agreed that this was feasible, and that they would work toward accomplishing such a result.

After this conference, the hearing resumed with Judge Holden reciting his disposition of the case on the record, and it is from this disposition of the case that Plaintiffs have appealed.

ISSUES PRESENTED FOR REVIEW

I. WHETHER OR NOT THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL UNDER 28 U.S.C. §1292(a)(1).

II. WHETHER THE LOWER COURT'S DISPOSITION OF THE CASE IS SUPPORTED BY SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW TO PERMIT REVIEW BY THIS COURT.

III. WHETHER APPELLATE REVIEW MUST BE DENIED DUE TO APPELLANTS HAVING AGREED TO ADJOURN THE LOWER COURT PROCEEDINGS IN ORDER TO PERMIT FURTHER HEARINGS AT THE ADMINISTRATIVE LEVEL.

IV. WHETHER THIS COURT SHOULD DISMISS THIS APPEAL AS MOOT.

I

THIS COURT LACKS JURISDICTION UNDER §1292(a)(1) TO ENTERTAIN AN APPEAL FROM AN INTERLOCUTORY DISTRICT COURT ORDER DENYING A TEMPORARY RESTRAINING ORDER.

28 U.S.C. §1292(a)(1) states that appellate jurisdiction arises from "interlocutory orders . . . refusing . . . injunctions".

In Morning Telegraph v. Powers, 450 F.2d 97 (2d Cir. 1971), cert. den., 450 U.S. 954, 31 L.Ed. 2d 231 (1972), this Court stated that while the grant or denial of a preliminary injunction is appealable under 28 U.S.C. §1292(a)(1), no such appeal lies from the grant or denial of a temporary restraining order. This principle has found general acceptance among the Courts of Appeals. See, e.g., Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086 (5th Cir. 1973); Drudge v. McKernon, 482 F.2d 1375 (4th Cir. 1973).

There does exist, however, a judicially created exception to the above rule. This Court, and others, have assumed jurisdiction over appeals from court actions upon temporary restraining orders when such actions are the equivalent of a grant or denial of preliminary injunctive relief. See Morning Telegraph v. Powers, supra, at 99. In such situations, the courts have viewed the orders as orders made "with respect to injunctions", rather than as grants or denials of temporary restraining orders, and have assumed jurisdiction

UNITED STATES COURT OF APPEALS
FOR THE

under 28 U.S.C. §1292(a)(1). Woods v. Wright, 334 F.2d 369 (5th Cir. 1964). More precisely, the practical effect of the order is held to control under these circumstances, rather than the characterization as applied by the trial court.

That the instant case falls outside of this qualified exception to the general rule is clear. The disposition made of Appellant's Motion for a Temporary Restraining Order by Chief Judge Holden at the conclusion of the March 30, 1976 proceedings called for a further hearing before an impartial hearing officer.* Adjournment of the District Court proceeding was for ten days, with leave for extension, to permit such a hearing to be arranged and conducted. Chief Judge Holden further specified that should circumstances require, he would entertain an application for cause to proceed on a hearing on the merits for preliminary and permanent injunctive relief. (Tr., 83-85) If Judge Holden's disposition of Appellant's Motion below has had the practical effect of a denial of preliminary injunctive relief, it is only because Jennifer Maraget's counsel did not make such an

---

* The procedure outlined by Judge Holden is similar to that ordered by the Court in DeJesus v. Penberthy, 344 F. Supp. 70 (D. Conn., 1972) There the Court withheld injunctive relief and directed the Board of Education to hold a new hearing on the matter, with proper safeguards to insure that the requirements of procedural due process were met. (Id. at p.78)

application.

The qualification to the statutory requirement that leave to appeal arises only from a final order has been viewed narrowly, as applying only to orders "determining substantial rights. . .which will be irreparably lost if review is delayed. . ." U.S. v. Wood, 295 F.2d 772 at 778 (5th Cir. 1961). The safeguards implicit in Chief Judge Holden's disposition of the proceeding below are inconsistent with any claim that Jennifer Maraget will suffer irreparable harm if this appeal is not granted.

II

ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE COURT BELOW DENIED PRELIMINARY INJUNCTIVE RELIEF, ITS DISPOSITION OF THE CASE LACKS SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED THEREON TO MEET THE STRICT REQUIREMENTS OF F.R.C.P. 52(a), AND, THEREFORE, IS NOT REVIEWABLE BY THIS COURT.

F.R.C.P. 52(a) states that ". . . in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action". This requirement has been held mandatory. Berguido v. Eastern Airlines, 369 F. 2d 874 (3d Cir. 1966). See, also, Wright & Miller, Federal Practice and Procedure, Civil, Sec. 2574.

One of the chief purposes of this requirement is to insure that in the event of an appeal, the reviewing court will be provided with a statement of the grounds upon which the lower court reached its decision. The failure to afford

the appellate court with such a basis has been held sufficient to remand for findings adequate to permit appellate review. In Lemelson v. Kellogg Company, 440 F.2d 986 (2d Cir. 1971) this Court stated that ". . .neither this court. . .nor the district court should condone failure to comply with the letter and spirit of . . . Rule [52(a)]. Therefore, it is necessary that we remand. . .to the district court for compliance with Rule 52(a)." (Id. at 898)

This appeal is based upon the District Court's adjournment of a hearing on the issuance of a temporary restraining order, in order that the parties might proceed promptly to a hearing before an impartial examiner. For this reason, the lack of supportive findings of fact or conclusions of law in Judge Holden's comments on pages 83 to 85 of the transcript is understandable. It is apparent from those comments that Judge Holden believed himself to be denying only a temporary restraining order not subject to appeal. It is also clear from his statements that in his estimation the merits as to injunctive relief had not been reached, as he held out to the Appellants the opportunity for a future application to proceed on the merits. [In at least two instances during the hearing, Judge Holden limited questioning as it approached the merits of the case, emphasizing the temporary relief prayed for (Tr., 26,67).]

The transcript holds nothing upon which the appellate court can review the withholding of injunctive relief. Indeed, the entire substance of the District Court's concluding remarks amounts to nothing more than a ten day adjournment, rather than a decision with concommitant findings of fact and conclusions of law.

III

THE APPELLANTS, BY AGREEING TO ADJOURN THE LOWER COURT PROCEEDINGS IN ORDER TO PERMIT FURTHER HEARINGS AT THE ADMINISTRATIVE LEVEL, CONSENTED TO THE COURT'S ACTION. ACCORDINGLY, APPELLATE REVIEW MUST BE DENIED.

The doctrine that a decree entered into with a party's consent is normally not reviewable is clearly established. In Swift & Co. v. U.S., 276 U.S. 311, at 323-24, (1928) the United States Supreme Court stated:

> ". . .[A] decree which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause."

Appellants refer in their brief (at p.4) to a conference held in chambers with Chief Judge Holden. It was there that the proposal for an alternative administrative hearing was discussed and agreed to by the parties.

In his remarks from the bench, Chief Judge Holden alluded to this agreement and withheld utilizing his injunctive power to issue a temporary restraining order so as to:

"enable the defendants to afford the plaintiff a hearing . . . and I have been assured by counsel that they feel that that can be arranged." (Tr., 84) [Emphasis supplied]

Further, Chief Judge Holden, obviously proceeding upon the understanding that all parties had consented to the adjournment, clearly provided appellant with recourse. In the event the administrative process ceased to satisfy the appellants, the Court clearly stated its intention to entertain an application to proceed on the merits of granting injunctive relief.

Implicit in the District Court's Order was the belief that Appellants had consented to the adjournment and that if subsequent events should prompt them to have a change of heart, the relief sought would be reconsidered by reopening the District Court proceedings. In this regard, it should be noted that the record in the case below makes it clear that no such application for injunctive relief was sought. Appellants should be bound by this consent to adjourn pending a further administrative determination.

In a 1972 case, Thonen v. Jenkins, 455 F.2d 977 the Fourth Circuit was faced with a situation quite similar to the present one. There, various officers of East Carolina University had appealed from an interlocutory order of the District Court granting an administrative appeal to a student who had been suspended indefinitely. The Court,

upon inspecting the record, found that the order under appeal had been entered with the consent of the University officials. The Court ruled that as long as the District Court had jurisdiction

> It [was]. . . axiomatic that defendants [could not] appeal from [the] order entered with their consent unless they establish[ed] facts to nullify their consent. Id. at 97.

Appellants have shown no lack of jurisdiction in the District Court, nor have they shown facts which nullify their consent. The record below makes it clear that Chief Judge Holden believed that his proposal for alternative relief had been accepted by all parties. This Court should affirm the action of the Court below.

IV

A GRANT OF INJUNCTIVE RELIEF AT THIS STAGE OF THE PROCEEDINGS WILL PROVIDE NO EFFECTIVE RELIEF FOR THE HARM ALLEGEDLY BEING SUFFERED BY JENNIFER MARAGET. THEREFORE, THIS COURT SHOULD DISMISS THIS APPEAL AS MOOT.

Events which have occurred subsequent to the March 30, 1976 hearing before Chief Judge Holden make it clear that this appeal should be dismissed as moot for at least three different reasons.

First, on April 13 and 14, 1976, and pursuant to the directions of the District Court below, a hearing was conducted before retired Vermont Supreme Court Justice F. Ray Keyser, at which time Jennifer Maraget was afforded due process protections consistent with the guidelines set forth by

Chief Judge Holden. Justice Keyser made Findings of Fact concerning the events upon which the original expulsion of Miss Maraget had been based, and consistent with instructions of Chief Judge Holden, forwarded these Findings to the Royalton School Board in order for them to reach a decision on the matter of expulsion. On May 13, 1976, and prior to reaching a decision based on Justice Keyser's Findings of Fact, the Board invited and permitted Miss Maraget's counsel to present oral argument to them. After affording Miss Maraget's counsel this hearing, and after due consideration, the Board concluded that Miss Maraget's presence in school was harmful to the welfare of the school and consented to the Superintendent of Schools dismissing her for the balance of the 1975-1976 academic year. (See Affidavit of Betty LaWhite, submitted to this Court under letter of May 26, 1976 in support of Appellees' Motion to Dismiss of May 21, 1976.) Insofar as the legal right which Jennifer Maraget relies upon in seeking injunctive relief consists of her right to procedural due process in any proceedings taken to expel her from school, it is clear that those rights have now been secured to Jennifer Maraget, and that if any defects existed in prior proceedings, they have been cured. See Winnick v. Manning, 460 F.2d 545, at 549 (1972); Phillips v. Buryear, 403 F. Supp. 80 (W.D. Va.1975).

Secondly, and as is shown by the Affidavit of Superin-

tendent Donald E. Jones (filed with this Court in support of Appellees' Motion to Dismiss dated May 21, 1976) it is apparent that since April 16, 1976, Jennifer Maraget has been attending Turkey Hollow School, in Barnard, Vermont, a private accredited high school, and that the Town of Sharon, Vermont has been paying tuition for her attendance at that school. In this connection, it is important to note that Goss v. Lopez, 419 U.S. 565, 42 L.Ed 2d 725 (1975), relied upon by Appellants, was premised upon a conclusion that state statute created "legitimate claims of entitlement to a public education." The statutes there involved "direct[ed] local authorities to provide a free education to all residents between five and twenty-one years of age." Goss v. Lopez, 419 U.S. at 573, 42 L.Ed 2d at 734. [Emphasis supplied] Under such circumstances, the Court held that a resident student had a right to procedural due process prior to suspension from school, inasmuch as there existed a risk of total exclusion from the educational process". (Emphasis supplied) Goss v. Lopez, 419 U.S. at 578. In contrast to the statutory and factual setting in which Goss v. Lopez arose, Jennifer Maraget was attending high school as a non-resident tuition student, and there was at least one high school (Hartford High School) in the district where she resided which was available for her attendance at all relevant times. (Tr., 18) Appellees submit that under the

Vermont statutes cited by Appellants only the school district within which Jennifer Maraget resided had an affirmative statutory obligation to furnish education to her. In contrast, the South Royalton School District was free to furnish education, or not, as it chose, under 16 V.S.A. §1093, which provides that "[a school] board may receive into the schools under its charge non-resident pupils under such terms and restrictions as it deems best. . ." Action under this statute as to acceptance and dismissal of non-resident pupils is within the sound discretion of the school directors. Op. Vt. Atty. Gen. (Mar. 12, 1958) No. 260; 1944 Op. Vt. Atty. Gen. 117; Sheldon Poor House Association v. Town of Sheldon, 72 Vt., 126, 47 A.542 (1900); Barton Town School District v. LaClair, 82 Vt. 240, 72 A. 1077 (1909).

Thirdly, as shown by the Affidavit of Betty LaWhite, Chairman of the Royalton Board of School Directors, the academic school year at South Royalton High School ends on June 10, 1976. Inasmuch as the expulsion order involved in this case ceases to operate any further after the termination of the 1975-1976 school year, and assuming that this Court acts immediately after oral hearing of this appeal, which is presently scheduled for June 9, 1976, a grant of injunctive relief by this Court will merely furnish Jennifer Maraget with an opportunity to attend South Royalton High School for the final day of the school year. Such token

relief would hardly furnish any meaningful remedy for Jennifer Maraget. Cf., Phillips v. Dallas Independent School District, 464 F. 2d 90 (5th Cir. 1972)

For each of the foregoing reasons, alone or in combination, it is submitted that Jennifer Maraget's claim for injunctive relief is now moot, and accordingly, this appeal should be dismissed.

CONCLUSION

In summary, the School contends that four clear reasons exist which, by themselves, or in combination, compel this Court to deny review of this appeal:

(1) Title 28, §1292(a)(1) does not confer jurisdiction over this appeal, inasmuch as the alternative relief granted to Plaintiffs below by Chief Judge Holden quite clearly left Plaintiffs with the option of seeking preliminary injunctive relief. If the Order below had the effect of a preliminary injunction, it was only because the Appellants never availed themselves of this opportunity.

(2) Rule 52(a) of the Federal Rules of Civil Procedure imposes a requirement that judicial decisions be supported by findings of fact and conclusions of law. In the absence of such findings and conclusions in this case, it is impossible for this Court to determine whether Chief Judge Holden's actions constituted an abuse of discretion, and accordingly, this appeal should be denied.

(3) It is apparent on the basis of the transcript below that both parties consented to a referral

of the matter below to an impartial hearing examiner, and having consented to this alternative disposition of their Motion, Appellants are not entitled to appeal from it.

(4) This appeal has been rendered moot by the following events which have transpired since entry of the Order being appealed from:

(a) Referral to an impartial hearing examiner, hearings having been conducted before him, and a new decision having been reached by the Town of Royalton Board of School Directors, thus curing any due process defects which may have existed in prior proceedings;

(b) Jennifer Maraget's enrollment and attendance at another accredited high school since April 16, 1976; and

(c) The conclusion of the 1975-1976 South Royalton High School academic year which will occur only one day after June 9, 1976, the date upon which this appeal has been scheduled for oral argument before the Court.

Dated at Montpelier, Vermont this 27th day of May, 1976.

Respectfully submitted,

BRIAN WRIGLEY ET AL

By Paterson, Gibson, Noble
& Brownell, Their Attorneys

By: _____
Leslie C. Pratt

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

JENNIFER MARAGET, a minor
By Next Friend and Mother,
SANDRA MARAGET,
Appellant

Civil Appeal
File No. 76-7215

VS.

BRIAN WRIGLEY ET AL
Appellees

CERTIFICATE OF SERVICE

I, Leslie C. Pratt, Esquire, of the firm of Paterson, Gibson, Noble & Brownell, P.O. Box 159, Montpelier, Vermont hereby certify that service of a true copy of Appellees' Brief was made on the Appellants by posting a copy in the mail in a proper United States Post Office receptacle, first class mail, in a sealed and properly stamped envelope, addressed to the following persons as attorneys for the Appellants:

Wendy A. Kaplan, Staff Attorney
Vermont Legal Aid, Inc.
3 Summer Street
Springfield, Vermont 05156

Patrick R. Berg, Esquire
Vermont Legal Aid, Inc.
51 1/2 Merchants Row
Rutland, Vermont 05701

Michael H. Lipson, Esquire
Vermont Legal Aid, Inc.
150 Cherry Street
Burlington, Vermont 05401

Steven R. Edelstein, Esquire
American Civil Liberties Union
of Vermont
State Street
Montpelier, Vermont 05602

Dated at Montpelier, Vermont this 27th day of May, 1976.

Leslie C. Pratt

PATERSON, GIBSON,
NOBLE & BROWNELL
P. O. BOX 159
MONTPELIER, VERMONT
05602